Denver Law Review

Volume 29 | Issue 9 Article 7

1952

Vol. 29, no. 9: Full Issue

Dicta Editorial Board

DICTA

VOLUME 29

1952

DICTA

Published monthly by the Denver Bar Association, the Colorado Bar Association, and the University of Denver College of Law.

SUBSCRIPTIONS AND CONTRIBUTIONS: 702 Midland Savings Building, Denver 2, Colorado, ALpine 1355.

CONTENTS

Volume XXIX, Number 9, September, 1952

EMINENT DOMAIN IN COLORADO

GILBERT GOLDSTEIN AND ABE L. HOFFMAN
of the Denver Bar

"Whatever may have been the ancient right of condemnation, it has been restrained by constitutional limitations in the protection of individual rights. The power lies dormant in the state until the legislature speaks . . . . The right to condemn private property is therefore a creature of statute, pursuant to which it must clearly appear either by express grant or by necessary implication." [1]

Thus spoke the Supreme Court of the State of Colorado in its most recent utterance in the field of Eminent Domain.[2] This statement brings into sharp contrast the right of the state and its subdivisions to appropriate private property and the right of the individual to be unmolested in the enjoyment of his property until there has been a declaration of public necessity and a grant of power by the legislature. It is obvious, then, that unless the statutes clearly state (1) the *purposes* for which property may be condemned; (2) *whose property* may be condemned, and *by whom;* and (3) the *procedure* such condemnation should follow, unavoidable litigation will result and, in fact, is taking place concerning preliminary matters rather than the basic question of the compensation to be paid.

This article will concern itself with an analysis of the provision of our Constitution and statutes on eminent domain, their strength and weakness, and attempt to come to some conclusion as to possible changes or amendments.

We may start with a fundamental proposition often stated by our courts:

> Both our state constitution and statutes protect the individual in his vested rights and prohibit the taking thereof for public or private use without condemnation under proper proceedings and just compensation given therefor.[3] . . .

The provisions of our Constitution referred to which protect these individual rights are embodied in Article II, Sections 14 and 15:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.
>
> Private property shall not be taken or damaged, for public or private use, without just compensation. Such

[1] Mack v. Town of Craig, 68 Colo. 337, 191 P. 101.

[2] Potashnick v. Public Service Co., Colo. Bar Assn. Advance Sheet, July 19, 1952.

[3] Stuart v. County Commissioners of Jefferson County, 25 Colo. App. 568, 575, 139 P. 577.

> compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

These sections merely confirm the common law limitation concerning who may take private property and emphasizes the fact that the use for which the property may be taken must be a *public use.* Although in the exceptional cases listed in Section 14 there is authority for taking of private property for *private* uses, the right is narrowly confined. In *Pine Martin Mining Co. v. Empire Zinc Co.,*[4] the Court stated:

> Although the words "private use" occur in our constitution and statutes, it is obvious that they do not mean a *strictly* private use, that is to say, one having no relation to the public interest. The fact that the constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi-public, or in a modified sense, affected with the public interest. . . .

Section 15 declares that property may not be taken or damaged without proper compensation. It also sets out the methods of determining the compensation, and provides that until this compensation has been paid into the court, the property shall not be needlessly disturbed. It also makes provision for a full judicial determination on whether the purpose for which property is proposed to be taken is a public use.

Though apparently expressed as clearly as possible, this constitutional provision has been involved in litigation in more than 50 cases reported by courts of review beginning with *Denver v. Bayer,*[5] and concluding with *Potaschnick v. Public Service Co.*[6] Even before this article appears in print, additional opinions may be handed down. Any word used in the constitutional provision may be a source of controversy. For example, whole treatises could be written on the meaning and implication of the words, *or damaged,* or upon the word, *public,* but such investigations are beyond the scope of this article.

The provision, however, does by limitation recognize the powers of the sovereign to condemn private property for public

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[4] 90 Colo. 529, 537, 11 P. 2d 221.
[5] 7 Colo. 13, 2 P. 6.
[6] Colorado Bar Assn. Advance Sheet, July 19, 1952.

use [7] and is the basis for every such taking in Colorado.

Despite the clear delimitations on the power of Eminent Domain set forth in the provisions just discussed, Article XV, Section 8 of the Constitution states:

> The right of eminent domain shall never be abridged nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.

Apparently the intent of this section is to prohibit forever a public body from alienating in any way its authority to condemn public utility corporations or their property.

Although this section has been quoted once [8] and cited twice [9] in Colorado decisions, it apparently has never been interpreted by our Supreme Court. It would seem to codify the common law doctrine that: "The power of eminent domain is inalienable and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it;" [10] and to make clear that corporate properties, including special franchises, may be taken just as individual property.

From the foregoing, it may be concluded that under the Constitution any property may be condemned for public use, but that, unless the legislature by statute outlines the extent of the power and who may exercise it and in what manner, this power will remain *dormant in the state.*

We shall now consider what statutory provisions have been enacted in Colorado and how well they answer the needs of the agency which takes and the owner of the property taken.

The statutory law of eminent domain legislation is compiled mainly in Chapter 61, 1935 Colo. Stat. Ann., under the heading, *Eminent Domain,* and Article 5, Chapter 163, 1935 Colo. Stat. Ann. entitled *Right of Eminent Domain* under the *Towns and Cities* chapter. This, unfortunately, does not mean that such legislation is not found in many other places in the statutes. On the contrary, it seems to be found everywhere. Authority to exercise the right of eminent domain by various state, city, quasi-public, or quasi-municipal corporations is found in Section 228, Chapter 41; Section 76, Chapter 57; Section 69, Chapter 73; Sections 3, 8, 39 and 70, Chapter 82; Section 96, Chapter 134; Sections 388, 444 and 478, Chapter 90; Section 189, Chapter 46; Sections 142 and 143, Chapter 138; Section 111, Chapter 143; Section 13, Chapter

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[7] Public Service Co. v. City of Loveland, 79 Colo. 217, 220.

[8] Public Service Co. v. City of Loveland, 79 Colo. 216, 245 P. 493.

[9] Denver Power Co. v. D. & R. G. W. R. R. Co., 30 Colo. 204, 69 P. 568; Fort Collins v. Public Serv. Co., 69 Colo. 554, 135 P. 1332.

[10] 8 Am. Jur. 636, Sec. 7.

138; all in 1935 Colo. Stat. Ann. and other places.

Apparently little or no study was made as to existing legislation when new statutes granting the right were passed. Conflicts thus may occur, as the following illustration will suggest:

Section 142, Chapter 138, states:

> The district, when necessary for the purposes of this article, shall have a dominant right of eminent domain over the right of eminent domain of railroad, telegraph, telephone, gas, water power and other companies and corporations, and over towns, cities and counties and other public corporations.

Section 70, Chapter 82, states:

> The purpose of condemnation for the rehabilitation of an area hereunder is hereby declared to be for a superior public use and property already devoted to one public use may be condemned for the purposes of this article. (S. L. '45, p. 622, Sec. 9, effective April 9, 1945.)

What happens when a *rehabilitation area* meets a *conservancy district?* Is this the irresistible force meeting the immovable object?

So, too, throughout our statutes, we have the same question, for the most part unanswered. How far does an agency whose use of land is public in nature have the authority to condemn the land of another public body already dedicated to one public use for another irreconcilable public use? The answer should be in the statutes, but, unfortunately, is not.

Article 5, Chapter 163, 1935 Colo. Stat. Ann., *Towns and Cities,* is a special purpose statute granting powers to cities of the first or second class for a restricted number of public uses, such as roads, parks or public improvements. Although it differs in many instances from the General Eminent Domain Act, there is a major point of possible distinction which should be discussed.

Under the general act, if no portion of a person's property is taken, he can receive no compensation for diminution in value of his property by reason of the proposed project, but a neighbor whose property is severed, may recover for the identical impairment to remainder which is denied in the first instance.

On the other hand, under the provisions of the Towns and Cities Act, Section 125, Chapter 163, damages are defined as follows:

> The fair and actual cash market value of all property proposed to be taken for the improvement without reference to the projected improvement, and
>
> The fair, direct, and actual damages caused on account of said improvement *to other property not taken for the improvement.*

and benefits are determined as follows:

> . . . by assessing against the owner or owners of *all real estate* which will be specially benefited by the proposed improvement the amounts of said benefit as special assessments.

It appears to the authors that the damages allowed and benefits assessed under the Towns and Cities Act are quite different from those referred to in the general statute, in that they contemplate all damages and all benefits to any property, whether or not there is a partial taking. The question of whether the general act is in accord with the Constitution does not appear to have been passed upon. It is of some advantage to the condemning agency to use the general act rather than the Towns and Cities Act. Under the latter, the extent of damage and benefit can be appraised only with difficulty, since it applies to property untouched but indirectly affected by a new improvement, be it park or parking lot. But, if the condemnation is invoked under the general act, the owner would not be chargeable for the benefits received nor compensable for detriment suffered where no part of his property is actually taken. Some revision of these inconsistent acts seems to be in order.

Although, as indicated, the provisions of Chapter 61 and Chapter 163 vary in many respects, our Supreme Court has failed in many instances to recognize this distinction. For instance, one of the mileposts in our interpretation of the General Eminent Domain Statute has been *Lavelle v. Julesburg*, 49 Colo. 290, decided in 1910. Yet, the case is cited as authority for *Wassenich v. Denver*, 67 Colo. 456, which came up under an amendment of 1911 to the Towns and Cities Act. The provisions of the two statutes on the point involved, far from being identical, appear to be contradictory. To illustrate further, *Wassenich v. Denver supra*, is cited as authority in numerous cases arising under the general act, although it purports to construe the widely different Towns and Cities Act.

To comment briefly upon the General Eminent Domain Act, we find first of all that it is not really one act with one procedure, but is a compilation of at least four separate acts conferring power in some cases on the same and in other cases on different condemning agencies through procedures that vary in substance as well as in detail.

Sections 1-20 of Chapter 61 comprise the basis of the Eminent Domain procedure in Colorado, being the procedure under which perhaps more than 90 per cent of all condemnation actions have been and are being brought. Historically, this is one of our oldest existing laws, going back at least to the General Laws of 1877, and codified in the 1935 Colo. Stat. Ann. with very little change or amendment, as will be discussed later.

Sections 21 to 25, Chapter 61, comprise the procedure for condemning land of the United States or the State of Colorado. The procedure therein set forth is quite different from the

other procedural portions of the general act (Sec. 1-20, Ch. 61) or the Towns and Cities Act (Ch. 163), thereby adding to the confusion. These sections are poorly drawn, without incorporation of definitions, leaving much to the judgment of the Court without guidance. Fortunately, the act has been used so little that the authors fail to find any reported case thereunder.

Sections 26-41, Chapter 61, were enacted by the legislature in 1907, as a bill: *Granting the exercise of the right of Eminent Domain to Tunnel Transportation Companies, Pipe Line Transmission Companies, Electric Power Transmission Companies and Aerial Tramway Companies.* The act itself merely confers upon these companies the power of Eminent Domain, but does not provide for the procedure. In Sec. 7 [11] of the act is found the following clauses:

> . . . and when the parties cannot agree upon . . . the amount of compensation . . . same shall be determined in manner *as now provided by law* for the exercise of the right of eminent domain. (Italics supplied.)

We ask, do the words *as now provided by law* mean the law of 1907 as it was without amendment, the law in 1908 at the time of the next revision of the statutes of Colorado, the law in 1921 at the time of the compilation of Colorado law, or does it mean the procedure under Sections 1-20, Chapter 61, 1935 Colo. Stat. Ann. as it exists *now* or may be changed hereafter?

The 1907 legislature, not quite satisfied with the confusion it had added to our law, authorized certain telegraph, telephone, electric light, power and pipe line companies to use the eminent domain act.[12] It gave such companies the right to acquire property *"as now provided by law for the exercise of the right of Eminent Domain and in the manner as set forth in this act."* Once again the pertinent question is, "when is now?"

To add to the confusion, the legislature included provisions in the second act of 1907 which were different from and contradictory to the general act (Sections 1-20). It included a special provision on immediate possession of property during pendency of action [13] which is different both in procedure and substance than the provision in the general act. [14]

The question of the constitutionality of this special provision has never been determined (although many cases have been tried under it in the past 45 years), and both its application and interpretation are still open to question. We mention one other incidental problem with respect to it. Sec. 39, Chap. 82, 1935 Colo. Stat. Ann., *Housing*, purports to confer upon a Housing Authority the right to use this special provision for condemnation. Can such right be given where the title of the original act limited its use to telephone, power, telegraph and like companies?

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[11] Now Sec. 32, Chap. 61, 1935 COLO. STAT. ANN.
[12] Now Sec. 42-49, Chap. 61, 1935 COLO. STAT. ANN.
[13] Now Sec. 47, Chap. 61, 1935 COLO. STAT. ANN.
[14] Now Sec. 6, Chap. 61, 1935 COLO. STAT. ANN.

Secs. 50 and 61, Chap. 61, 1935 Colo. Stat. Ann., passed in the 1901 session of the legislature, granted to telegraph, telephone, heat, light, and power companies selling electrical energy, certain rights of eminent domain. The statute refers back to Sections 1-20 for its procedure.

But, Sec. 52, Chap. 61, *supra,* passed by the legislature in the 1891 session already had granted certain rights of Eminent Domain, including the right of companies to construct telegraph lines and pipe lines.

Apparently there is some needless duplication, since even this brief examination reveals that you may condemn rights-of-way for telegraph lines under at least five different eminent domain provisions. In fact, it is even possible that if a city were condemning land for a pipe line, the owner would be awarded a different amount of compensation if the city chose to proceed under one statute (Chap. 163) than if the city chose to proceed under any of the other of its various authorities.

But that is not all, because if the city has a Home Rule Charter, under Article XX of the Constitution, it may proceed under the Eminent Domain provisions of the Charter and ignore all the other laws granting the same power. Charter provisions may vary to such an extent that we will not undertake to discuss them here, except to mention that Denver's Charter adopts the *general law* on the assessment of benefits and payment of damages and overrides other public uses (1927 Compilation, Section 80), with special provisions for boulevards, sewers, viaducts and fire and police stations.

Having clearly demonstrated that confusion exists in the statutory law of eminent domain, we would now like to analyze Secs. 1-20, Chap. 61, 1935 Colo. Stat. Ann., the procedural provisions under which, as we have indicated, the bulk of all such condemnation actions are brought.

Because this was a special procedural statute, it was not affected by our new Rules of Civil Proceedure. As a result, an attorney who has the good fortune to represent a petitioner or a respondent in such a case must learn a whole new set of rules which hark back to the days of our Code with its *not found* [15] returns, etc.

This procedure is so old that if a married woman owns property in her own right, her husband must be joined as a party with her.[16] We trust that the League of Women Voters has not heard of this.

A more patent defect in the procedure concerns the *immediate possession* provision of the statute [17] under which, if proper conditions are present, a condemning authority, after filing its petition, may obtain immediate possession of the premises being condemned during the pendency of the action. For many years this

[15] Sec. 4, Chap. 61, *supra.*
[16] Sec. 2, Chap. 61, *supra.*
[17] Sec. 6, Chap. 61, *supra.*

was considered an *ex parte* procedure. Then came the thunderbolt of *Swift v. Smith* [18] in which our Supreme Court said:

> An order for immediate possession does not necessarily involve title to the lands, but it does affect possession so that the imperative requirement of the statute "shall determine" would imply *some notice* to the one in actual possesion with some opportunity afforded him to testify.

Just what do these words *some notice* mean? Do they mean a telephone call; do they mean an actual personal service of a notice; do they mean that every person in possession, including the minor children, must be served; or do they mean that service on the head of the family or a posting of the premises is sufficient? The statute is so deficient in setting up the procedure for this immediate possession that it would require innumerable court cases to delineate what could be simply explained by legislative act. If the so-called procedural sections of the statute do not even set forth the simplest formulae of procedure essential to due process of law, we may as well be without them entirely.

Did you ever hear of a case in a court of record where the defendant does not have to answer the complaint or petition? In the condemnation procedure of our statute there is no provision for answer. Thus, the case may come to trial without any indication as to the issues to be raised. In spite of the fact that no answer is provided for, or necessary,[19] the act provides [20] that any party may demand a jury of freeholders, "before the time for the defendant *to appear and answer.*" This and many like instances of confusion pervade our present eminent domain law.

Another peculiarity of condemnation law is that at the trial the respondent has the burden of proof, and opens and closes his case to the jury.

During the past five years, the authors, acting either for the petitioner or for the respondents, have participated in over 300 condemnation actions. This participation has revealed to us the confusion which exists in our present acts and the desperate need for revision.

We hope that this article has either revealed this confusion to you or confused you sufficiently so that you, as members of the Bar, will participate in an attempt to draft and have passed a new Eminent Domain Act in Colorado which will clearly, concisely state who may condemn property; for what purpose property may be condemned; what property may be condemned and under what circumstances; and, how condemnation shall proceed. We submit it is time to rework and codify the law of eminent domain from start to finish.

We note that in this issue of *Dicta* there are two suggestions of possible procedural changes. One indicates the method used by the Federal Government in adopting a special Rule of Civil

[18] 119 Colo. 126.
[19] Whitehead v. Denver, 13 Colo. App. 134, 136; 56 P. 913.
[20] Sec. 7, Chap. 61, *supra.*

Procedure dealing with the subject, and the other is an even more simplified set of statutory or judicial rules suggested for Colorado. We urge you to examine these and other changes which will be suggested and lend your assistance in arriving at the best law, both procedural and substantive, for *the right to condemn private property is a creature of statute,* and such rights which deprive people of their property without their consent for the good of the public should be very clearly set forth.

FEDERAL PROCEDURE IN CONDEMNATION OF PROPERTY

CLIFFORD C. CHITTIM
Assistant United States Attorney for the District of Colorado.

The key to procedure in the Federal Courts in the condemnation of property under the power of eminent domain is Rule 71A,[1] which became effective as an amendment to the Federal Rules of Civil Procedure August 1, 1951. This rule sets up a specialized procedure to meet the distinctive requirements of an eminent domain action, and integrates into the Federal Rules the procedure in such actions. Except as otherwise provided in that rule, the rules of civil procedure for the United States District Courts control.

The adoption of Rule 71A came in response to growing widespread dissatisfaction with the diverse procedures applied in condemnation suits in United States District Courts and the accompanying demand for some uniform procedure. The Advisory Committee on Rules, prior to its recommendation of the Rules of 1938, and again when it was considering the amendments of 1946, had given serious consideration to proposals to incorporate in the rules one covering condemnation proceedings.[2] The great number of condemnation suits filed by the United States during the war gave added impetus to the demand for uniformity and some degree of simplification in the rules. These procedural changes, it was argued, would make more effective both the exercise of the power of eminent domain and the constitutional right of the property owner to just compensation. Rule 71A brings condemnation proceedings under the Federal Rules of Civil Procedure; establishes, with one exception, the same procedure in the various United States District Courts; and, in an attempt to simplify the procedure, incorporates several departures from the procedure more commonly followed in the state courts and, prior to its adoption, in the federal courts.

The Rules of Civil Procedure, as adopted in 1938, were applicable in condemnation cases only on appeals. In pre-appellate procedure, a vast number of diversified procedures existed in the United States District Courts. In some of the acts authorizing the exercise of the power of eminent domain, Congress had prescribed, in varying

[1] United States Code, Title 28, Federal Rules of Civil Procedure.
[2] *Ibid.* Notes of Advisory Committee on Rules, following Rule 71A.

degree, the procedure to be followed. Such procedures were by no means uniform. In more numerous instances, the Congressional act authorizing the exercise of the power of eminent domain failed to specify the exact procedure to be followed. In the absence of Congressional prescribed procedure, conformity, as near as may be, to existing state practice, pleadings, forms and proceedings, with its attending uncertainty and confusion, was required.[3] Rule 71A covers the condemnation of both real and personal property. For the great bulk of condemnation cases, those invoking the national power of eminent domain, it provides procedure that is uniform in all the United States District Courts. In the limited number of cases involving the exercise of the state's power of eminent domain, which reach the United States District Courts because of diversity of citizenship, the same procedure, with a single exception, applies. Subdivision (k) of the rule provides that, in those cases involving the exercise of the power of eminent domain under the law of the state, any state law making provision for trial of any issue by jury, or for the trial of the issue of compensation by jury or commission or both, shall be followed.

The following paragraphs do not purport to go beyond a descriptive summary, the primary purpose of which is to present the principal features of federal condemnation procedure, as distinguished from the procedure in other civil cases in the federal courts, with a view to reflecting in that specialized procedure the principal points of departure from condemnation procedure in courts of the state of Colorado.

COMPLAINT

The caption, in addition to meeting the general requirements of Rule 10(a), must name as defendants the property and at least one of the defendants. Broad joinder, including properties acquired for different uses, is authorized. Any defendant aggrieved by such joinder may invoke the power of the court under Rule 21 to sever and procede separately with any claim, and the court's wide discretion, under Rule 42(b), to order separate trials. The specified contents of the complaint are a short and plain statement of (1) the authority for the taking; (2) the use for which the property is taken; (3) a description of the property; (4) the interests to be acquired; and (5) identification, as to each piece of property, of the defendants joined as owners or persons interested therein. At the commencement of the action, only those persons having or claiming an interest in the property, whose names are then known, need be joined as defendants, but prior to any hearing for the determination of compensation, the plaintiff must add as defendants,

> All persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be

[3] 40 U. S. C. 258 (1940).

acquired, and also those whose names have otherwise been learned.

All others may be made defendants under the designation "Unknown Owners."

Since service of the complaint with the notice is not required, the plaintiff must furnish to the clerk at least one copy for the use of the defendants. The necessity for frequent amendments to add new parties or to embrace additional property or interests is recognized. Prior to the trial of the issue of compensation, the plaintiff may amend the complaint, without leave of court, as many times as desired, provided such amendment does not constitute a dismissal prohibited by subdivision (i) of the rule. Any affected party, who has not appeared, must be served with notice in the manner provided for service of process, and any affected party, who has appeared, must be served with notice of the filing of the amendment.

PROCESS

In place of a summons, the initial process is a notice. The plaintiff is directed to deliver to the clerk, at the time of the filing of the complaint, joint or several notices directed to the defendants named in the complaint. The form of the notice is calculated to advise the defendant of the claim asserted against him and what his rights are. In addition to the caption and a designation of the defendants to whom directed, the notice must state (1) that the action is to condemn property; (2) a description of his property; (3) the interest to be taken; (4) the authority for the taking; (5) the uses for which taken; and (6) advise the defendant that, within 20 days after service of the notice, he may serve upon plaintiff's attorney an answer, and failure to do so constitutes consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation.

Personal service of the notice, in accordance with Rule 4(c), is required upon any defendant who resides in the United States, its territories or its possessions and whose address is known. If personal service can not be secured either because the defendant's whereabouts can not be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country, service of the notice by publication is authorized. For the customary affidavit and court order is substituted a certificate of the plaintiff's attorney based upon a diligent inquiry within the state in which the complaint is filed. Publication is once a week for not less than three successive weeks. Under the federal decisions, this requirement is met by publication in only three issues. Prior to the last publication, plaintiff's attorney must mail a copy of the notice to any defendant, not personally served, whose place of residence is then known. Proof of publication and mailing is made by a certificate of plaintiff's attorney, to which is attached a printed copy of the published notice.

APPEARANCE AND ANSWER

Rule 71A(e) provides for an Answer and Notice of Appearance. No other pleading or motion asserting any additional defense

or objection is allowed.[4] Any defendant who desires to assert any objection or defense to the taking of his property, must, within 20 days after the service of notice upon him, serve upon plaintiff's attorney his answer, identifying the property, stating the nature and extent of his interest, and stating his objections and defenses. The requirement that all objections and defenses be set up in the answer with no provision for preliminary motions marks a departure from Rule 12(e). The general standard of pleading is controlled by other rules, particularly Rule 8. Instead of an Answer, the defendant may serve a Notice of Appearance, designating the property in which he claims an interest. This entitles him to receive notice of all proceedings affecting such property. To the defendant who has neither answered nor appeared is preserved the right to present evidence at the trial of the issue of just compensation as to the amount of compensation to which he is entitled, and the right to share in the award.

TRIAL

The most controversial issue, prior to the adoption of Rule 71A, resolved around the question of the particular tribunal to award compensation in actions involving the exercise of the power of eminent domain under the law of the United States. To retain the board of commissioners set up under the Tennessee Valley Authority and the special jury in the District of Columbia, and to provide for any special tribunal which may be established by Congress in the future, it is provided that any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation, shall be used. In all other instances, the defendant is entitled to the determination of just compensation by trial by jury on filing a demand therefor within the time allowed for answer, or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, compensation should be determined by a commission of three persons appointed by it.[5] Such a commission is endowed with the powers of a master under Rule 53(c). Trial of all issues shall otherwise be by the court.

TITLE AND POSSESSION

Rule 71A does not supersede any of the statutes authorizing the United States to take title to or possession of the property at the commencement of the suit, nor does it prescribe the procedure to be followed when those rights are exercised by the petitioner.

[4] U. S. v. 76.15 Acres of Land, U. S. Dist. Ct., N. D. Calif., March 7, 1952; 16 Fed. Rules Service 71A-e4, Case 1. Defendant may not file a cross-claim for breach of lease, against a co-defendant, owner of land involved.

[5] U. S. v. 3928.09 Acres of Land, U. S. Dist. Ct., W. D. S. C., December 22, 1951; 16 Fed. Rules Serv. 71A-h3, Case 1, 12 FRD 127. Court not restricted to residents of the district in appointing commissioners, and in the condemnation of lands located in two states, the same persons may be appointed by the court in each of the districts.

However, its drafters formulated the other procedure in the light of the existence of both rights and the practice which had developed in their exercise. The manner of dismissal prescribed in subdivision (i) depends upon whether or not the United States has exercised either of these rights. Again, subdivision (j), dealing with deposits and distribution, recognizes the permissive use of the declaration of taking and enjoins the court and attorneys to expedite the distribution of the money deposited in court and the ascertainment and payment of just compensation.

The Declaration of Taking Act [6] has been characterized as a supplemental condemnation statute. The United States, in any proceeding instituted by it in any court of the United States outside the District of Columbia for the acquisition of land or an interest therein, may file with its petition, or any time prior to judgment, a declaration of taking signed by the authority empowered by law to acquire the lands. Upon the filing of the declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the estimated just compensation, title vests in the United States, and the right to just compensation vests in the persons entitled thereto. The court, upon appropriate application of the parties in interest, may order all or any part of the money so deposited paid forthwith for or on account of the just compensation to be awarded in the proceeding. Upon the filing of the declaration of taking, the court is vested with the power to fix the time within which and the terms upon which the parties in possession are required to surrender possession to the petitioner.

Without resorting to a declaration of taking, the United States, in condemnations for a work of river and harbor improvements [7] and in proceedings under the Atomic Energy Act of 1946,[8] may take immediate possession of the property upon the filing of the petition in condemnation. In time of war or the imminence thereof, a similar provision may be invoked in condemnation of land by the Secretary of the Army for military purposes.[9]

OPERATION OF RULE

There can be little doubt that, as far as the federal courts are concerned, Rule 71A marks a great improvement over the pre-existing conformity system. However, any critical appraisal of the extent to which it has provided the simple and improved procedure for condemnation contemplated would be premature at the conclusion of only one year's operation. The rule reflects extensive research and was the net result of prolonged mature consideration, in which both the legal profession and government officials played important roles. The Advisory Committee moved slowly and cautiously and reports that it gave more time to this rule than was required by any other rule. The basic principles and most of the

[6] 40 U. S. C. 258 a-e.
[7] 33 U. S. C. 594.
[8] 42 U. S. C. 1813(b).
[9] 50 U. S. C. 171.

specific rules have long been in operation and have been tried and tested in the judicial fire in various jurisdictions. The minor innovations for the most part represent an attempt to adapt to condemnation procedure the general principles and pervading spirit already successfully applied in the rules of civil procedure. The Supreme Court in promulgating Rule 71A makes it applicable to further proceedings in pending actions except to the extent that, in the opinion of the court, its application would not be feasible or would work injustice. The difficulties characteristic of any transition from one procedure to another and of the application of the modified procedure to pending cases have been present during this first year. To date there have been very few written opinions construing or applying the rule.

BUREAUCRATS DICTIONARY

A Program—Any assignment that can't be completed by one telephone call.

A Conference—A place where conversation is substituted for the dreariness of labor and the loneliness of thought.

To Give Someone the Picture—A long, confused and inaccurate statement to a newcomer.

Co-ordinator—The guy who has a desk between two expediters.

To Expedite—To confound confusion with commotion.

A Clarification—To fill in the background with so many details that the foreground goes underground.

Channels—The trail left by inter-office memos.

To Activate—To make carbons and add more names to the memo.

To Implement a Program—Hire more people and expand the office.

Under Consideration—Never heard of it.

Under Active Consideration—We're looking in the files for it.

Reorientation—Getting used to working again.

Reliable Source—The guy you just met.

Informed Source—The guy who told the guy you just met.

Unimpeachable Source—The guy who started the rumor in the first place.

We Are Making a Survey—We need more time to think of an answer.

Note and Initial—Let's spread the responsibility for this.

Give Us the Benefit of Your Present Thinking—We'll listen to what you have to say as long as it doesn't interfere with what we've already decided to do.

Will Advise You in Due Course—If we figure it out, we'll let you know.

Readers of *Dicta* are invited to contribute articles, anecdotes and items of interest.

SOME PROBLEMS OF SEVERANCE DAMAGE

FRED M. WINNER
of the Denver Bar

Freeways, limited access highways, super highways, toll roads, sewage disposal plants, housing authorities and other various and assorted modern improvements are giving rise to many problems in the award of severance damage. The answers to these problems make a very substantial difference to the owners whose property is to be condemned, and the purpose of this memorandum is simply to invite attention to some of the existing problems—some of which have, and some of which have not been before our court.

The statutory authority for the award of severance damage is found in 3 Colo. Stat. Ann., c. 61, § 17, which provides, in substance, that an owner is entitled to the value of the property taken, plus any damage to the remainder. Benefits, if any, resulting from the public improvement may be offset against the damage to the remainder, but they may not be offset against the value of the property taken. Nowhere in the statute is there to be found any exact definition of the elements of damage which may be considered, but the general rule of damage has been said to be that "the damages to the residue should be equal to the diminution in the market value of such residue for any purpose to which it may reasonably be put." *Fenlon v. Western Light and Power Co.*, 74 Colo. 521, 223 P. 48 (1924).[1]

At the outset, it should be remembered that the choice of the word "severance" to describe the type of damage which is compensable was advisedly made. For, if a portion of an owner's property is actually taken, he may be entitled to compensation for a diminution in the value of his remaining property, even though his neighbor (no portion of whose property is taken) is denied recovery. This somewhat incongruous result was explained by the United States Supreme Court in *Campbell v. United States*, 266 U. S. 368 (1924), where it was said:

> It is only because of the taking of part of his land that (plaintiff) became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the 5th Amendment giving just compensation does not apply.[2]

The importance of this rule most frequently arises in a situation where the proposed improvement unquestionably benefits the entire community, but it detracts from the particular neighborhood in which the improvement is being built. As a horrible example, assume that the city decides to build a sewage disposal plant in an area which has been planned and subdivided for expensive homes. The proposed plant will chop a few feet off the land of A, but it will come only to the boundary of B's property. Undoubtedly, the value of each owner's property will be substantially diminished as a result

[1] To the same effect is United States v. Grizzard, 219 U. S. 180 (1911).
[2] See also, Gilbert v. Greeley R. Co., 13 Colo. 501, 22 P. 814 (1889).

of the erection of the plant, but A is entitled to the resulting diminution in value of the remainder of his land, while B is entitled to nothing as severance damage.[3]

This type of damage is sometimes referred to in the cases as "damage from the proposed use," and the eligibility of A for an award for this particular damage is discussed in *Grizzard v. United States*, 219 U.S., 180 (1911), where it is said:

> Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.[4]

Symbolic of the rule permitting an award of damages resulting from the proposed use is *United States v. Dickinson*, 331 U.S. 745 (1947), where the War Department constructed a dam on respondent's land and contended that it was liable only for the land actually taken and not for the diminution in value to the remainder of the land resulting from the probability that the dam would cause future erosion. In holding that compensation had to be paid for all land taken and for all value which would be lost in the future as a result of the future erosion, the Court said: "If the government cannot take the acreage it wants without also washing away more, that more becomes part of the taking."

Frequently cited in opposition to the rule that damages resulting from the proposed use are compensable is *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 P. 774 (1910), a case subject to as many interpretations as there are parties to the lawsuit. Carefully read, it is submitted that this portion of the *Town of Julesburg* case does nothing more than adopt two general rules: (1) That mere personal inconvenience is not compensable in eminent domain, and, (2) that to be compensable, the damage to the remainder must be special, and must not be a damage shared by the public generally. In that case, the condemnation suit was brought to acquire land for a power house, and the case was apparently tried on a theory of seeking compensation for the inconvenience which would result from the smoke and vapors rather than on the theory of seeking compensation for a resulting diminution in value of the remaining land. The choice of language in the *Town of Julesburg* case is unfortunate, but the case does not appear to depart from the general rule that damages caused by the proposed use are compensable.

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[3] Whether or not B is entitled to damage on some other theory is not within the scope of this memorandum.

[4] Among the Colorado cases permitting an award for this type of damage are Farmers Reservoir & Irrigation Co. v. Cooper, 54 Colo. 402 130 P. 1004 (1913); Denver & S. F. R. Co. v. Hannegan, 43 Colo. 122, 95 P. 343 (1908); Wassenich v. City and County of Denver, 67 Colo. 456, 186 P. 533 (1919); and City and County of Denver v. Tondall, 86 Colo. 372, 282 P. 191 (1929).

UNITIES REQUIRED FOR ALLOWANCE OF SEVERANCE DAMAGE [5]

A most difficult question, and a question which has not been squarely before our court, is the question of the unities required to permit an award of severance damage. Traditionally, the three essential unities were said to be: (1) unity of ownership; (2) unity of use; and (3) contiguity of the land.

The cases discussing the required unity of ownership to permit an award of severance damage are relatively few, and almost without exception they have applied a hyper-technical rule requiring absolute identity of ownership if severance damage is to be awarded. The results of the application of the rule are often patently unfair, but, unfortunately, the problem is not uncommon in the trial courts. As an example, assume a ranch property acquired at several different times over a period of years. The home place was taken in the husband's name, but, with the growing popularity of joint tenancies, other properties were acquired jointly by husband and wife. If the home place is condemned for a reclamation project, does the difference in formal title prevent an award of severance damage to the remainder of the ranch? Under the great weight of authority, it does,[6] and it is suggested that a lawyer consulted concerning a proposed condemnation should first inquire as to the status of the title and that appropriate conveyances should be made immediately, especially if the case has not as yet been filed.

Unquestionably, unity of use must be present if an award for severance damage is to be made. The land taken and the land remaining must have been devoted to the same use if severance damage is to be awarded; and if the land taken was devoted to an entirely different use from that made of the land remaining, no award for severance can be made.

The perfect illustration of this requirement is *Stockton v. Marengo,* 137 Cal. App. 760, 31 P. 2d 467 (1934). There, a corner of a farm had been separately fenced and used as a service station. A new highway was put through the farm and the service station was rendered almost valueless. The California court held that because of the different uses made of the land taken and the land remaining, no compensation could be allowed for the service station.[7]

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[5] An annotation in 6 A. L. R. 2d 1197, covers many of the cases discussing this problem.

[6] Illustrative of the rule is Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234 (1910), where one tract was owned by a husband and an adjoining tract was owned by husband and wife as tenants by the entireties. The court refused to allow severance damage because, "This cannot be extended to cover lands owned by different proprietors." See also: Tillman v. Lewisburg R. Co., 133 Tenn. 554, 182 S. W. 597 (1916); McIntyre v. Board of Doniphan County, 168 Kan. 115, 211 P. 2d 59 (1949); San Benito County v. Copper Mtn. Min. Co., 7 Cal. App. 2d 82, 45 P. 2d 428 (1935). Perhaps *contra* are Chicago & E. R. Co. v. Dresel, 110 Ill. 89 (1884), and Lavelle v. Town of Julesbury, *supra.*

[7] In Long Beach v. Stewart, 30 Calif. 2d 763, 185 P. 2d 585 (1947), it was held that where the property not taken was zoned differently from the property taken, no severance damage would be allowed in the absence of a showing of a probability that the zoning of the two tracts could have been made uniform.

The third of the traditional required unities is that of contiguity of the land, and it is in this sphere that recent opinions have shown a marked departure from the older rule requiring actual physical contiguity.[8] Loosely stated, the modern rule is that if two pieces of property are closely integrated in use, the fact that they are not physically contiguous does not prevent an award of severance damage, and the properties will be regarded as *constructively contiguous* for the purpose of the award of severance damage.

In fact, the ocean itself has not troubled the judicial mind in deciding that two pieces of real estate are constructively contiguous; for, in *Baetjer v. United States,* 143 F. 2d 391 (1st Cir., 1944), the court had no hesitancy in saying that the island of Vieques, situate 17 nautical miles southeast of Puerto Rico, was contiguous with Puerto Rico for the purpose of awarding severance damage. There, the government seized Vieques which had been used to grow sugar cane milled in Puerto Rico, and the court held that the diminution in value of the Puerto Rican mill caused by the taking of Vieques was compensable in the condemnation suit as severance damage.

The doctrine of constructive contiguity is most important in Colorado with our widespread ranching operations; and, although our court has not discussed the point at length,[9] the Tenth Circuit clearly recognized and applied the doctrine to a farm operation in *Grand River Authority v. Thompson,* 118 F. 2d 242 (1941). Under the modern rule, it seems that severance damage can be awarded for damage to integrated, but non-contiguous ranch property. Certainly, the question will be squarely presented to our court in the not too distant future.

The conclusion to be drawn from the foregoing comments is evident. The Colorado law of eminent domain is sufficiently undeveloped that a lawyer can safely advise a client that there are two (or more) lines of authority and that he has a fighting chance. With the passage of time and the arrival of clients possessed of a competitive spirit and means with which to compete, the many undetermined questions in eminent domain should be determined by further judicial and legislative clarification.

In the meantime, the safest course to pursue is to employ an expert witness, sufficiently versed in appraisal techniques to compete on even terms with the expert employed by the other side.[10] If this safeguard is adopted, there is every reason to believe that

[8] Reference is again made to the annotation in 6 A. L. R. 2d 1197, which reviews most of the cases.

[9] There is at least a suggestion of a recognition of the rule of "constructive contiguity" in that old ambiguous favorite, Lavelle v. Town of Julesburg, *supra.* and in Public Service Co. v. City of Loveland, 79 Colo. 216, 245 P. 493 (1926), the rule is apparently applied. But, see the instruction approved in Board of Commissioners v. Noble, 117 Colo. 77, 184 P. 2d 142 (1947), a case in which the question of constructive contiguity does not appear to have been raised.

[10] See United States v. 257.654 Acres of Land, (T. H.) 72 F. Supp. 903 (1947), for a case in which an expert successfully changed profits into market value, much to the confusion of the trial judge.

the jury will completely disregard the testimony and award either what they think the property is worth or what they think the condemnor can afford to pay.

A word of advice for the lawyer representing an impecunious client, unable to enjoy the luxury of submitting a case to the scrutiny of the Supreme Court, is that Major Goodman has recently taken the position that under the authority of *Wassenich v. City and County of Denver*, 67 Colo. 456, 186 P. 533 (1919) at least in Denver, you can appear in a condemnation case without paying your $5 docket fee. So, all that is required to get the best guess of the trial judge is that the lawyer must have the competitive spirit, and he does not now have to have $5 to go along with it.

NEW REAL ESTATE STANDARD

At a meeting held on July 15, 1952, the Real Estate Standards Committee of the Denver Bar Association promulgated Standard No. 76 relating to inheritance tax liens. Due to recent opinions of the Colorado Supreme Court, the Committee believed that a note must be appended to present Standard No. 47. Standard No. 76 and the Note to Standard No. 47 are set out below and will be presented to the members of the Colorado Bar Association for ratification at the 1952 Convention next October.

STANDARD NO. 76

INHERITANCE TAX—LIMITATION OF LIEN

Problem: The record shows that more than 15 years have elapsed since the date of the death of a decedent owning real estate. No receipt for payment of Colorado Inheritance Tax or waiver or release thereof appears of record. Should an attorney, relying on Section 7, Chapter 145, Session Laws of 1945, render an opinion showing the title free and clear of any lien for Colorado Inheritance Tax accruing as the result of the death of said decedent?

Answer: Yes.

NOTE TO FOLLOW STANDARD NO. 47

In connection with this standard, you are referred to the recent Colorado cases of *Mitchell v. Espinosa* (243 P. 2d 412) and *Johnson v. McLaughlin* (242 P. 2d 812), both decided March 17, 1952. These cases concern a severance of mineral rights prior to a tax sale of land and prior to the issuance of a Treasurer's Deed thereon, and hold that such mineral rights do not pass by Treasurer's Deed unless separately assessed and sold.

In each case, the Treasurer's Deed in question was the source of title of the person in possession of the land, and one of the deeds had remained of record approximately nineteen years and the other deed approximately seventeen years. In each instance, the tax sale and the Treasurer's Deed based thereon did not except any mineral rights.

The court in its opinions made no reference to the limitation statute on which real estate Standard No. 47 is based (Sec. 146, Chap. 40, C.S.A. '35 as amended by Session Laws of 1945, Chap. 101).

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PROPOSED EMINENT DOMAIN LAW FOR COLORADO

GLENN G. SAUNDERS AND WILLARD S. SNYDER
of the Denver Bar

Colorado legislation in the field of eminent domain is divided into three main categories: (1) classifications of those who may exercise the power of eminent domain; (2) procedures for effectuating the exercise of eminent domain powers; and (3) devices for use by municipalities in financing the cost of projects involving the use of eminent domain. This article is confined to the second of the above categories.

Eminent domain procedures should be simple and quick. They can be, because there are only two issues: (1) the right of the petitioner to exercise the power of eminent domain; and (2) the determination of the amount which should justly be paid to the respondent. Analysis of present legislation would reveal that its various fragments were apparently designed from time to time to meet special existing situations, and there is no necessary relationship or correlation between the fragments. Rather than discuss these fragments, it appears that the most sensible way to approach this problem is to suggest the legislation which should cover the field of procedure in eminent domain and then briefly analyze the suggestions. We believe this to be a sound approach, because the ultimate objective of the bar association is to create a comprehensive new eminent domain law of which procedural sections would be a necessary part.

The following sections concerning procedure in eminent domain under Colorado law are proposed for the consideration of the bar.

Section 1. A petitioner shall commence a proceeding in eminent domain by filing a verified petition as hereinafter prescribed in the district court of the county in which the property to be taken or some part thereof is located.

Section 2. A petition in condemnation shall contain the following:

a. A caption as in other civil actions, provided however that the parties shall be called "petitioner" and "respondent," and the petition shall be entitled "petition in condemnation."

b. A clear and concise statement of the following:

1. The name of the petitioner.

2. The authority of the petitioner to prosecute the proceedings including a statement of the use to which the property to be taken is intended to be put by the petitioner.

3. A statement that the compensation to be paid cannot be agreed upon by the parties interested, or that some one or more of the respondents is incapable of consenting or cannot be found.

4. The names of all persons interested as owners or otherwise as appearing of record. Unknown persons, if any, shall be designated as "all unknown persons who claim any interest in the subject matter of this action."
5. An accurate description in such form as will be capable of being generally understood by those familiar with titles to property setting forth the interest in the property to be taken in the proceedings.
6. A prayer asking that the compensation to be paid for the interest sought by the petitioner be determined, and that upon deposit into the registry of the Court of said amount, the Court enter a decree vesting in the petitioner title to the interest or interests in the property described in the petition and for such other relief as may be proper in the premises.

c. The petition shall be signed as provided by the rules of civil procedure and shall be verified by the oath of the petitioner or of someone in behalf of the petitioner.

d. A map of the land or lands sought to be taken shall be attached to the petition whenever a map will aid understanding of the description of the land sought to be condemned.

Section 3. Summons shall be issued as provided by the rules of civil procedure. In every case, except service by publication, the petition shall be attached to and served with the summons. In event, of service of process by publication, the publication shall be once each week for three successive weeks. Except as otherwise herein provided, service and proof of service of the summons shall be as provided by the rules of civil procedure.

The summons shall be captioned as in other civil actions, except that it shall be entitled "summons in condemnation," and the parties will be called "petitioner" and "respondent." It shall contain substantially the following language:

> To the above named respondent....: You are hereby summoned and required to file with the clerk of the above mentioned court an answer to the petition in condemnation which is attached hereto and made a part hereof or make written appearance herein within 20 days after the service of this summons upon you. If you fail to do so, the Court will proceed as provided by law to determine the amount to be paid you and the other respondents herein if any there be, for the property to be taken hereunder, and the Court will proceed to cause said property to be conveyed to the petitioner without further notice to you. If you desire to question the authority of the petitioner to maintain this action, or if you desire to have the amount to be paid on account of the taking herein contemplated determined by a jury, you will make such facts known by your answer or you will be conclusively presumed to have waived any right to question petitioner's authority or to demand a jury trial.

If service upon you is made outside the state of Colorado or by publication you are required to file your answer within 30 days after service of this summons upon you or 30 days after the first such publication.

A description of the interests in property to be taken is as follows: .....

Dated at ....., Colorado this ..... day of ....., ...

Section 4. A *lis pendens* may be filed in the manner and with the effect as provided by the rules of civil procedure. The petitioner shall be liable for all abstracting fees arising as the result of the filing of such *lis pendens* which may become a charge against any other person in the normal course of evidencing such person's title.

Section 5. If any respondent shall question the authority of a petitioner to exercise the power of eminent domain in any case, he shall file an answer stating his grounds for questioning such authority in plain succinct language and the issue thus raised shall be tried before any trial or hearing with respect to compensation to be paid by petitioner on account of the taking. Within ten days of receipt of such answer, petitioner may, but shall not be required to, file a reply to such answer. If any respondent shall desire to have the compensation to be paid by the petitioner fixed by a jury he shall so indicate in writing by answer. If any respondent desires neither to question petitioner's authority nor demand a jury he shall merely make a written appearance in the action. No other pleading shall be allowed.

Section 6. All questions regarding compensation shall be determined by commissioners or jury as the case may be. All other questions shall be determined by the court.

Section 7. If no respondent shall demand a jury trial as provided in this act, the Court shall appoint, as a board of commissioners, three freeholders to determine the compensation to be paid and shall fix the time and place for the first meeting of such commissioners. The commissioners before entering upon the duties of their office shall take an oath to faithfully and impartially discharge their duties as commissioners. Any one of them may administer oaths to witnesses, issue subpoenas, and compel witnesses to attend and testify. They shall hear the allegations and proofs of the parties and a record of the proceedings shall be kept; and after viewing the premises they shall file with the clerk of the court a certificate setting forth their determination of the compensation to be allowed. Upon notice to other parties, any party may move for confirmation of the certificate, and the Court may thereupon confirm the certificate or any part thereof or may set it aside for irregularity or for error of law in the proceedings before the commissioners, or upon the ground that the award cannot be sustained by the evidence. If

the certificate or any part thereof is set aside, the Court shall appoint new commissioners and direct a re-hearing of the whole issue of compensation or of the part of the award set aside. If the certificate is confirmed, the court shall proceed as hereinafter set forth. The commissioners shall be allowed reasonable compensation for their services, the amount of which shall be fixed by the Court.

Section 8. After the filing of the petition in condemnation, a motion may be filed requesting the right of possession during the pendency of the action, or the pendency of appellate proceedings respecting the action. In event the motion is filed prior to verdict or finding of value by commissioners, it shall be supported by the affidavit of a qualified appraiser as to the value of the interest to be taken and as to the value of one year's rental of such interest. If the motion is filed thereafter, it shall be supported by the affidavit of a qualified appraiser as to the value of one year's rental of such interest. When a respondent shall have entered his appearance in the proceeding, either personally or by his attorney, said respondent or his attorney shall be served, unless previously served as hereinafter provided, with the motion, affidavit and notice of hearing at least 48 hours before the time of hearing. Respondents who are not in default and who have entered no appearance shall be served either at the time of the service of the summons or thereafter with the motion, affidavit and notice of hearing at least one week before the time of the hearing, such service to be made as provided by the rules of civil procedure for the service of summons. Respondents, if any, who are being or have been served with the summons by publication, and who have not entered an appearance in the proceeding, need not be given any notice of the hearing for immediate possession provided that an order of the Court authorizing such service by publication shall have been entered prior to the time of the hearing. If there is pending and undetermined a pleading questioning the right of the petitioner to maintain the whole or any part of the eminent domain proceedings, a date for the hearing on immediate possession may be set but the question of the right to maintain the action shall first be determined.

Section 9. Upon the hearing of the motion for immediate possession, the Court may forthwith enter an order for such possession upon the payment into the registry of the court for the protection of the respondent or respondents of: (a) an amount equal to the appraised value of the interest to be taken if determined prior to verdict or appraisement by commissioners, or the amount of the verdict or appraisement if known, which amount shall be held in the registry of the court pending the final determination of the proceedings; and (b) an amount equal to one year's rental value of the property to be taken for the immediate use of the respondent or respondents to be paid them, if more than one, as may appear equitable to the court. If possession shall have been taken prior to the verdict of the jury or award by the commissioners and if the

petitioner desires to maintain such possession during appellate proceedings, the amount deposited in the registry of the court on account of the appraised value shall be increased or diminished so as to equal the amount of the verdict or award. Whenever it shall appear to the court that the amount finally determined to be due the respondent or respondents will not be payable within the period for which rental shall have been allowed, whether such delay shall occur in the trial court or due to review proceedings, the trial court shall have and retain jurisdiction and shall exercise it to provide, by appropriate order or other process, so that the respondent or respondents shall be paid sufficient amounts, from time to time, as will be equal to the rental value of the property to be taken, provided that at no time shall more than one year's advance rental value be required to be deposited for or paid to respondent or respondents.

Section 10. If the Court shall not be satisfied on the affidavit or other proof offered to him by petitioner or respondent or respondents as to the amount which should be paid into the registry of the court for any of the purposes above mentioned, the Court may appoint some qualified person to investigate and report promptly to the Court as the Court's witness under oath regarding such matters. The fee of such witness shall be such reasonable amount as the Court shall fix and shall be paid by the petitioner as a part of the cost of the suit.

Section 11. The compensation to be paid on account of any taking in eminent domain shall include payment for the value of the interest in property taken, the damages if any to the interest of the respondent or respondents in that part of the whole property not included in the taking, and as an offset to such damage, the benefit if any to the interest of the respondent or the respondents in that part of the whole property not taken, each of said three items being in every case itemized in the verdict of the jury or certificate of the board of commissioners unless the whole property be taken.

Section 12. Inspection of the property which is the subject of any eminent domain proceeding by any person or persons connected with the proceedings as witness, commissioner, juror, or judge may be made at any reasonable time, and in case of failure of the parties to agree, the judge may make an appropriate order or orders respecting such inspection.

Section 13. Every value shall be fixed as of the time of its determination, and successive hearings on value may be held if necessary so that at the time of final taking the amount received by the respondent or respondents shall be the exact and true value of the property interest of which respondent or respondents will be deprived by the proceeding as near as may be.

Section 14. Any jury to determine the compensation to be paid shall consist entirely of freeholders and shall be a jury of six or twelve as designated by the respondent or respondents in any answer filed in such proceedings. In the absence of any designation as to number, a jury of six shall be used. Jurors shall be selected in the manner customary in civil actions.

Section 15. When the compensation to be paid by the petitioner shall have been finally determined, the petitioner shall pay such amount into the registry of the court within five days of such final determination and shall thereupon be entitled to a decree as hereinafter set forth, provided that the amount so to be paid into the registry of the court shall be diminished by the amount of any unearned rental previously paid to the respondent or respondents on account of immediate possession having been taken by the petitioner; provided further that if petitioner has not and does not take possession, he shall not be obligated to make such payment in case he shall elect to undertake appellate proceedings or dismiss the proceedings in the district court within said five days.

Section 16. The final decree in eminent domain proceedings shall recite the description of the interest in property taken and the name of the petitioner for whose benefit the decree is entered and the names of all the respondents. It shall also recite the payment into the registry of the court of the amount of money entitling the petitioner to the issuance of a final decree, and when issued and recorded in the office of the clerk and recorder of the county or counties where the property so taken is located, the final decree shall act and be a conveyance of the interest so described to the petitioner so named effective as of the date of such recording.

Section 17. The courts shall give eminent domain proceedings under this act preference over all other civil actions except injunction and workmen's compensation suits in the matter of setting same for hearing or trial and in hearing the same to the end that all such actions shall be quickly determined.

* * * * *

It is contemplated that the general sections of any eminent domain law will provide as a matter of substantive law for those in whom the power of eminent domain is vested and that their determination of the necessity for the taking will be conclusive upon the court in the absence of fraud, malice, oppression or the like. It is also assumed that any interest in property real or personal and in the entirety or in part may be taken. The present statute contemplates a fee simple title which would apply only to real estate and which overlooks that in many cases only an easement is required. The present statute fails to contemplate that war time conditions may create shortages of personal properties which are absolutely needed by public utilities such as radio equipment, automobiles, pipe, wire and the like, and it is doubtful whether such prop-

erty could be reached under the present procedures. Yet such personal properties are absolutely essential to the continuation of our functioning as an organized community.

It will be noted that we also contemplate that reasonable effort shall be made to contact the owner of the property and attempt to secure it by negotiation before any eminent domain proceeding can be started. We regard the federal practice of a declaration of seizure without the necessity of prior negotiations to be arbitrary and high-handed. We believe that the federal employees in almost every case endeavor in good faith to negotiate with property owners before filing such declarations, but there appears no reason why any government employee or anyone else who has the power of eminent domain should not be required to make a good faith effort to avoid litigation as a condition precedent to the right to exercise the strong power of eminent domain.

CONSTITUTIONAL AMENDMENT NO. 1 NEEDS SUPPORT OF THE BAR

The Colorado Bar Association, acting through its Judiciary Committee, has had placed on the ballot a constitutional amendment which deals with the Compensation, Services and Retirement of Judges.

These are the principle changes advocated by the amendment:

1. Salaries of Judges may be increased or decreased *during their terms of office.*
2. A judge may not run for any other elective office, other than judcial, without first resigning his judicial office.
3. Any judge found to be permanently disabled by reason of mental or physical infirmities, *shall* be retired. The Attorney General will initiate the action by motion to the Supreme Court, and after full investigation the decision shall be made.

The proposed constitutional amendment No. 1 was drafted by the Colorado Bar Association Judiciary Committee with the aid of members of the Supreme Court. It has been approved by the District Judges' Association and the County Judges' Association.

The changes from the present law are obvious. They are vitally necessary. Supreme Court Justices who are elected for a period of ten years find themselves bound to the same salary for the entire decade. Regardless of economic conditions, the legislature is powerless to increase the salary of an incumbent elective officer. The same is true, of course, of District and County Judges. We have the untenable situation now of the most experienced judges receiving the lowest salaries—it was their misfortune to

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be elected 8 years ago, or 4 years ago. The proposed constitutional amendment No. 1 will remedy this situation once and for all.

The other changes are equally important, particularly the retirement feature. When judges are unable to sit there is imposed a great hardship on litigants and attorneys. The docket becomes more and more cluttered and outside judges are pressed into service, sometimes at a sacrifice to their own districts or counties.

It is the firm belief of the Colorado Bar Association Judiciary Committee that proposed Constitutional Amedment No. 1 is vitally necessary for the benefit of our judicial system. Therefore, we earnestly solicit the support of every lawyer in Colorado as an active partisan in the passage of the proposed Constitutional Amendment No. 1.

CONSTITUTIONAL AMENDMENT NO. 1

Section 18 of Article VI of the Constitution of the State of Colorado is hereby amended to read as follows:

Section 18. *Compensation and Services of Judges.* Judges of courts of record shall receive such compensation as may be provided by law, which may be increased or decreased during their terms of office, and shall also receive such pension or retirement benefits as may be provided by law. The Supreme Court shall be open except on Sundays and holidays during customary hours of court. No judge of the District Court or Supreme Court shall accept nomination for any public service other than judicial, the term of which shall begin more than thirty days before the end of his term of office, without first resigning from his judicial office, nor shall he engage in the practice of law, nor shall he hold office in a political party organization. When called upon so to act any county judge admitted to the practice of law in the State of Colorado may serve as district judge in any district with full authority therein as the judge of the district wherein he serves.

Article VI shall be and hereby is further amended by the addition of the following Section 31 thereto:

Section 31. *Retirement.* Any judge of any court now existing in the State of Colorado, or hereafter created, shall be retired from office if found permanently disabled, by reason of mental or physical infirmities, from performing the duties of his office. Issues concerning retirement for disability shall be initiated by motion of the Attorney General to the Supreme Court for investigation concerning the permanent disability of such judge, whereupon said court may appoint a referee who shall have authority to subpoena witnesses and make full investigation and submit his report thereon to the court. In the event the court shall determine such judge to be so permanently disabled, he shall be retired with such pension or retirement benefits as he would have received had he fully completed his then term of office. Upon such retirement his office shall be deemed vacant and be filled as provided by law.

LINCOLN'S ADMONITION[1]

Let every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution never to violate in the least particular the laws of the country and never to tolerate their violation.

Let every man remember that to violate the law is to trample on the blood of his father, and to tear the charter of his own and his children's liberty. Let reverence for the law be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling books, and in almanacs; let it be preached from the pulpit; proclaimed from legislative halls, and enforced in courts of justice. And in short, let it become the political religion of the nation, and let the old and young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions sacrifice unceasingly upon its altars.—Abraham Lincoln.

RED CROSS BLOOD BANK

Members of the Bar who forcefully uphold the constitutional rights of Man in our nation, state and city are generally listed as the foremost members of the community.

There is another avenue of endeavor in which they should lead . . . in that now important necessity to supply blood for the health of the wounded who were fighting in Korea and have fallen before enemy guns.

The Department of Defense needs 300,000 pints of blood each month for whole blood transfusions and for the plasma reserves required for use whenever and wherever the need arises.

This blood is needed for people and must be supplied by people.

When you think of the fact that more than 106,000 Americans have been killed or wounded in Korea, you must realize that the blood which has helped to save innumerable lives has been shipped from blood centers such as those located in Denver.

These blood centers require a steady stream of donations . . . your donations. The Red Cross is the collection agency for the Armed Forces. It also collects blood which you can call for to aid the members of your family who may be stricken ill or may be victims of accidents.

Arrangements for a blood donation may be made by contacting your local Red Cross office—In Denver ALpine 0311.

YOUR BLOOD MAY BE THE GIFT OF LIFE FOR SOMEONE YOU KNOW.

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[1] People v. Westrup, 372 Ill. 517, 25 N.E. 2d 16, 18.

THE FUNCTION OF COURTS IN MAINTAINING CONSTITUTIONAL GOVERNMENT AND INDIVIDUAL FREEDOM*

ALBERT C. JACOBS
Chancellor and Professor of Law, University of Denver

Constitutional government and individual freedom are the foundation stones of the American heritage. They are the issues vitally at stake in the world-wide struggle of prolonged duration in which we are currently engaged. This conflict involves two opposing and utterly irreconcilable ways of life, two opposing and utterly irreconcilable ideologies — the one championing and the other repudiating constitutional government and individual freedom. It is therefore fitting to consider the function of the courts in maintaining these bulwarks of the American way of life.

I. MAINTAINING CONSTITUTIONAL GOVERNMENT

Two related problems are presented, the maintenance, first of constitutional government, and, second, of individual freedom. I shall consider them in this order.

What, in the first place, is the function of the courts in maintaining constitutional government? The recent historic decision of the Supreme Court of the United States in *The Youngstown Sheet and Tube Co., et al., v. Sawyer*,[1] affirming the ruling of Judge Pine, which directed the return of the steel industry to its owners, dramatically focused the nation's attention on this far-reaching issue.

Constitutional government has been termed "a government of laws and not of men." In his concurring opinion in *United States v. United Mine Workers of America*,[2] Mr. Justice Frankfurter said:

> The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, *whether by the fiat of governmental or private power.* Every act of government may be challenged by an appeal to law, as finally pronounced by this Court.

Constitutional government, may I add, involves two essential principles. It must be representative. But representative government is not always constitutional; it may be absolute. To be constitutional government must also be limited. Without such limitations constitutional government cannot exist.

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*An address delivered before the Conference of the Tenth Judicial Circuit in Denver July 18, 1952.

[1] ..... U. S. ....., ... S. C. ..... (1952).

[2] 330 U. S. 258, 307 (1947).

At a time when totalitarianism dominates wide areas of the world, the maintenance of constitutional government is of fundamental importance.

Doctrine of Separation of Powers

You are all familiar with the actions of our Founding Fathers in establishing constitutional government in the newly born republic. "They were setting up," in the words of Charles P. Curtis, Jr.,[3] "a new government to be endowed by the thirteen states and their people with a number of designated and limited powers, naming them and stating explicitly that all not named were retained by the states and the pepole. What is more," Mr. Curtis continues,

> the first eight amendments added a Bill of Rights which forbade the new government to do certain things. It had a floor, below which the powers retained by the states were not to be disturbed. It had a ceiling, above which the essential and inalienable rights of individuals were not to be infringed. Then, too, . . . the new government was divided vertically into three departments, Congress, who were to make all the new laws, the President, who was to execute them, and the Court, who were to fit the new laws into that great body of law and apply them by the process of litigation to the hard particular case.

The intent of our Constitutional Fathers is well expressed by Mr. Justice Brandeis in his famous dissent in *Myers v. United States*:[4]

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

And Mr. Justice Frankfurter said in his concurring opinion in the steel case:[5]

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

Such then, in broad strokes, was the constitutional government created by our Founding Fathers — a federal government

[3] LIONS UNDER THE THRONE, p. 9 (1947).
[4] 272 U. S. 52, 293 (1926).
[5] *Supra*, n. 1.

endowed by the several states with delegated powers, in which, as every school boy knows, the tripartite division of governmental power was guaranteed by an elaborate system of checks and balances. To understand the whys and the wherefores, one need but refer to the "continuous controversy over the royal prerogative in England of the seventeenth century."

In this connection I quote from the lucid statement in the brief for the plaintiff steel companies in the recent case before the Supreme Court, p. 30:

> The present claim of the Executive to an inherent right to do whatever he considers necessary for what he views as the common good—without consulting the legislature and without any authority under law — is not a new claim. It is precisely that which was made more than three centuries ago by James I of England when he claimed for himself the right to make law by proclamation and asserted that it was treason to maintain that the King was under the law. It is precisely the claim for which Charles I lost his life and James II his throne. Most importantly, it is precisely the claim for which George III lost his American colonies. In short, it was the continued effort of the English Crown to exercise unfettered prerogative that culminated in the War of Independence and the establishment of the United States under the form of government provided in the Constitution.

It was, you will recall, the passage of the English Bill of Rights in 1688 that established finally that the Crown was under the law. Preceding the American Revolution the colonists had their own struggle with George III and his ministers. During this struggle they "appealed constantly to their fundamental rights as Englishmen which had been bestowed by Magna Carta and the English Bill of Rights."

To quote again from the plaintiffs' brief in the Supreme Court, p. 37:

> It was against this background that the Founding Fathers drafted our Constitution. The constitutional debates, . . . reveal with graphic clarity that the delegates had firmly in mind the recent excesses of the English Crown against the Colonies and the long and costly struggle that had been waged by the people of England . . . before the royal power had been circumscribed and placed under the law.

The Role of the Judiciary

What then is the function of the courts in maintaining this constitutional framework? The Constitution gives no clear cut and definite answer. Article III provides that: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Original as well as appellate jurisdiction, the latter

"under such regulations as the Congress shall make" is conferred upon the Court. And Article VI provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and judges in every state shall be bound thereby." The Fathers of the Constitution did seek to secure the complete independence of the judiciary — the judges could not be removed by the President, nor could their salaries be diminished by Congress. They did, however, leave unsettled what that eminent authority on the American Constitution, Viscount Bryce, termed "a joint in the court's armour" — the number of judges on the Supreme Court, a weakness of which we heard plenty a decade and a half ago. Much is left unsaid in the Constitution concerning the position of the Supreme Court and other tribunals, and perhaps with a nicety of wisdom. Mr. Curtis [6] observes that "The Convention left the Court to its own devices." And that eminent authority, Mr. Justice Holmes said in his dissent in *Springer v. Philippine Islands:*[7] "The great ordinances of the Constitution do not establish and divide fields of black and white."

Thus a delicate and a difficult problem was presented. The words of Mr. Justice Frankfurter in his concurring opinion in the recent steel case are much to the point:

> A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The resolution of the function of the courts has resulted from such "knowledge and wisdom and self-discipline."

A long-time colleague at Columbia, Professor Herbert Wechsler, has written in his article entitled "Stone and The Constitution": [8]

> For whatever the importance of the Supreme Court as the ultimate voice in the ordinary areas of judicial administration, its dominant role inheres in its special position in the American constitutional scheme. Within the range of contested litigation the court sits not alone to expound the law that it is within the province of Congress to change but also, as Chief Justice Stone has put it, to "determine the boundaries and distribution of power under a federal constitutional system."

Much has taken place since the drafting of the Constitution.

Let us return to Professor Wechsler's clear statement: [9] "The special function of the Court in the resolution of constitutional controversies has encountered attack from the beginning, but a cen-

[6] LIONS UNDER THE THRONE, p. 13 (1947).
[7] 277 U. S. 189, 209 (1928).
[8] COL. L. REV. 764, 765 (1946).
[9] *Ibid.*

tury and a half of polemic inspired no uncertainty on the issue in the mind of Mr. Stone." The late Chief Justice wrote in *Law and Its Administration:*[10] "A study of the Federal Constitution and the conditions leading to its enactment" leaves "no reasonable doubt that the doctrine of Marbury against Madison is legally and historically sound." In that famous case,[11] Chief Justice Marshall established the duty of the courts to review action of the government and to keep it within constitutional bounds. That great biographer of the early Chief Justice, Albert J. Beveridge, III, has written that John Marshall thus "set up a landmark in American history so high that all the future could take bearing from it, so enduring that all the shocks the nation was to endure could not overturn it." [12]

In 1929 we find Mr. Stone saying: [13] The "history of the judicial function before the adoption of the Constitution, the language of the Constitution itself in Article VI and the long arm of judicial decision, leave that question no longer debatable." On another occasion the late Chief Justice wrote: [14]

> To have formulated in written language a separation of governmental powers into state and national with specific limitations upon each, as the supreme law of the land, and to have denied to the courts the power to apply that law in the settlement of controversies pending before them, would have been not only contrary to the experience of the colonies but would have involved the performance of the functions of government in confusion and in conflicts of authority which would have imperiled the success of the great experiment.

In his article on "The Common Law in the United States," [15] Mr. Stone wrote:

> Government of a continent of forty-eight states, each making and administering its own laws, together with a central government of limited powers, set over them for limited purposes, making and administering laws of its own within the same territory [has been made] practicable and tolerable [only because] its framework has admitted of the solution of the clashing demands of the interests it has created by judicial decision in conformity to the methods of the common law.

Limitations on Power of Judiciary

But Chief Justice Stone cautioned,[16] that the judicial review "brought to the judicial function a task of peculiar gravity and

[10] Stone, LAW AND ITS ADMINISTRATION, p. 135 (1915).
[11] 1 Cranch 137 (1803).
[12] Beveridge, JOHN MARSHALL, p. 142.
[13] Stone, FIFTY YEARS WORK OF THE UNITED STATES SUPREME COURT, 8 ORE. L. REV. 248, 260 (1929).
[14] Stone, LAW AND ITS ADMINISTRATION, pp. 137-138 (1915).
[15] Stone, THE COMMON LAW IN THE UNITED STATES, 50 HARV. L. REV. 22 (1936).
[16] *Id.* at 21.

delicacy." Recall the words of Mr. Justice Frankfurter in the recent steel case: [17]

> The framers . . . did not make the judiciary the overseer of government. . . . Religious adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public.

Mr. Justice Frankfurter continued:

> The path of duty for this court . . . lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. . . . A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

Our judicial system thus exercises a tremendous power and responsibility in maintaining our constitutional government. And thank God it does! The recent exercise of this power in the steel case is lasting proof thereof. The nation eagerly awaited its decision; it respectfully followed its mandate. It will long stand as a landmark of constitutional government. The Executive, in an hour of great crisis and with the welfare of the nation at heart, was prevented from seizing the steel industry, from establishing a precedent that would permit further and greater invasions of individual freedom. The President had based his action on the war powers declaring that an "emergency" existed and that he was the "steward" of the general welfare. Recall the words of Mr. Justice Douglas in this case: "All executive power — from the reign of ancient kings to the rule of modern dictators — has the outward appearance of efficiency." And Mr. Justice Jackson reminded us that:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

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[17] *Supra*, n. 1.

Mr. Justice Frankfurter said in the steel case: "The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court's role in the history of the country."

But how has the Court attained this high stature? Mr. Curtis explains it thus: [18] "The clue to the court's power lies partly in the need that the job be done, and partly in the way the Court has done the job." And Chief Justice Stone in his dissent in *United States v. Butler*,[19] pointed out two guiding principles of decision:

> One is that the courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

Mr. Curtis has pointed out,[20] that

> Time after time, dozens of times, Congress bowed its belief that a measure was constitutional before the Court's belief that it was not, and forsook what it wanted to do out of respect for the Court's opinion that it should not do it. The income tax is but one example. The prevention of child labor is another. Twice Congress proposed to stop it. Twice the Court said no, once in 1916, again in 1922. Congress was willing to wait until the National Labor Relations Act was held valid in 1937.

Federalism, one of the court's functions, calls for consummate statesmanship. But nothing explicit is said about federalism in the Constitution. Rather it is implicit. The powers of the federal government are delegated. All the other powers are reserved by the Tenth Amendment to the states and to the people. The Court had to keep the equipoise. The Court threw its weight against the national threat of the New Deal. When the nation was young, it was the other way about. "It had then to be protected from the powers of the several states."

The Court has done a splendid job. It handled with "knowledge and wisdom and self-discipline" the trying problems of the New Deal. It has recognized that the Constitution is not an immutable document, that its Framers did not provide for stagnation. The courts stand today as the greatest power in maintaining constitutional government.

II. Maintaining Individual Freedom

I turn now to the function of the courts in maintaining individual liberty. Individual liberty, the freedom and dignity of the

[18] Lions Under the Throne, p. 46 (1947).
[19] 297 U. S. 1, 78-79 (1936).
[20] Lions Under the Throne, pp. 45-46 (1947).

individual, underlie the global conflict in which we are engaged. In this era of severe tension, of crisis and hysteria it is imperative that they be preserved inviolate; that in seeking security we do not abandon our precious freedoms. A fairly recent editorial in *The Washington Post* wisely said "that course . . . would be burning down the house of the American way of life in order to get at the rats in it."

May I recall the statement of Mr. Justice Jackson in 1951, in his lecture entitled "Wartime Security and Liberty Under Law," that "the dangers to our liberties . . . are those that we create among ourselves." And may I also bring to your attention the words of General Dwight D. Eisenhower: "All our freedoms are a single bundle, all must be secure if any is to be preserved."

Balance Needed Between Law and Freedom

Mr. Justice Jackson in the lecture to which I have referred has said:

> The essence of liberty is the rule of law. Only when impersonal forces which we know as law are strong enough to restrain both official action and action by private groups is there real personal liberty. Liberty is not mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting formerly depressed classes to power, it is not the inevitable by-product of technological advance. Freedom is achieved only by a complex but just structure of rules of law, impersonally and dispassionately enforced against both rulers and the governed.

And the late Mr. Justice Rutledge wrote:[21] "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure." Without constitutional government, individual liberty cannot exist. The steel case was therefore a magnificent victory for the cause of freedom.

The first ten Amendments to the Constitution contain in substance the legal structure of our liberties. These amendments fall into two general classes — some tell how the judicial process shall be managed; others place limitations on the powers of the Congress or the Executive. These, like the Declaration of Independence and the Constitution, date from the eighteenth century. But their ideology is still alive here. They must be read in connection with the fourteenth Amendment.

In regard to the function of the court in maintaining individual liberty, Mr. Curtis[22] has written:

> [this] is different and harder and calls for something more than statesmanship, almost priestcraft. There is certainly something about it that is either religious in a large meas-

[21] Rutledge, A DECLARATION OF LEGAL FAITH, p. 6 (1947).
[22] LIONS UNDER THE THRONE, pp. 50-51 (1947).

> ure or akin to religion. . . . We have not only a government to which some things have been wholly denied. We recognize certain natural inherent rights in man as an individual which we believe no government, municipal, state, or national, may abridge or infringe. Who is going to see to it? This is the other job we expect the Court to do.

In these trying days we would, I think all agree with the statement of Mr. Justice Jackson in the lecture to which I have referred: "I suppose the American people, on whose eternal vigilance liberty ultimately depends, are all well agreed that what they want of the courts is that they both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it." This is their greatest challenge.

No civilized nation has come closer to the ultimate of freedom for man than the United States. No other nation has achieved a better balance between liberty and authority. But today constitutional government and individual liberty stand at the cross-roads. They face serious external and internal challenge.

The danger to individual freedom is from within as well as without. Fanatical partisans in our midst support our only probable future enemy. We know too well that these misguided persons could in strategic places give valuable aid and comfort to the potential enemy. But, as Mr. Justice Jackson has so clearly pointed out, "probably much greater than their capacity for actual harm is their capacity to arouse fears and hatreds among us. A secret conspiratorial group, even if not very potent itself, can goad the government into striking blindly and fiercely at all suspects in a manner inconsistent with our normal ideas of liberty." I need merely to recall the Civil War and World Wars I and II.

Over the years legal controversy has resulted from those Amendments that primarily are restraints upon the Legislative or the Executive branches of government. For many years the chief sources of litigation were the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, applied as limitations on substantive law. In recent years litigation has succeeded more frequently by invoking the First Amendment. This amendement is now applied to prohibit abridgment by states, cities, school boards and local courts of freedom of speech, press, assembly and religion.

Mr. Justice Jackson has written in the lecture already cited:

> Whatever the defects of our constitutional system of legal liberties, however much the generality of their statement permits uncertain applications and varying interpretations, it can hardly be questioned that they have guided the courts in normal times to a protection of the rights of the individual against the mass, and the citizen against the government, that compares favorably with the conditions of any nation.

But attempts are still being made by the misguided, the unin-

structed and the perverted upon our liberties. Illustrations would be superfluous. And we are not living in normal times.

You are all familiar with the decision in *Gitlow v. New York*,[23] which established that the due process clause of the Fourteenth Amendment imposed some limitations on the states in relation to assembly or speech. The Court said: [24] "Freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." In the words of Mr. Curtis,[25] the Court thus extended "its jurisdiction over personal liberties so that it could reach at will any violation, not only by Congress, but by any governmental action anywhere in the United States, by State, City or town, by anyone acting in an official capacity."

Responsibility of Judiciary

It is the courts upon whom falls the important duty of reconciling the conflicting claims of the States in the enforcement of their criminal laws and the rights of the individual to liberty under the law. A delicate and difficult task is imposed. It must be exercised with "knowledge and wisdom and self-discipline" if individual liberty is to continue. In the recent case of *Rochin v. California*,[26] Mr. Justice Frankfurter said:

> The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. . . . To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed state of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude, that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Of all the rights protected by the first ten Amendments that of free speech is most important for guarding our liberties. I shall not discuss the doctrine of "preferred" and "deferred" rights. Fortunately the courts have been particularly concerned about freedom of speech and have taken the view as enunciated by Mr. Justice

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[23] 268 U. S. 652 (1925).
[24] *Id.* at 666.
[25] LIONS UNDER THE THRONE, p. 266 (1947).
[26] ..... U. S. ....., 72 S. C. 205 (1952).

Holmes in *Schenck v. United States*,[27] and in *United States v. Abrams*,[28] that there must be a "clear and present danger" of serious harm to the body politic arising from the speech sought to be prohibited. It is heartening for the prospect of freedom that the Supreme Court has recently declared in *Terminiello v. Chicago*,[29] " . . . a function of free speech under our system of government is to invite dispute." This is in keeping with the tradition of the Court and its concern for its peacetime prerogatives being assumed by the executive under the guise of war powers.

Because of the prominence of the Supreme Court we are prone to forget the significant role of the lower Federal Courts and of the State tribunals. But it is these courts which set the tone of law enforcement and of the public view concerning constitutionality and individual freedom. If our lower courts are intimidated into a denial of these rights and freedoms, then this protective bulwark will crumble and tyranny run rampant in our midst. Dictatorship and statism of some form would surely follow. It is my firm belief that the courts can, if they act swiftly and firmly when key issues arise, be the best protection of our fundamental freedoms. There are those who grant the position of the courts as a bulwark of freedom but nonetheless feel they are not equipped to act in an emergency. I certainly cannot agree with Zechariah Chafee, Jr., when he writes [30] that "The nine Justices on the Supreme Court can only lock the door after the Liberty Bell is stolen."

The success of the courts in protecting rights, however, is largely dependent upon two factors: public opinion and the legal profession. The particular responsibility of the legal profession in the service of the courts is too often forgotten. It is perhaps more than a witticism to say that ours is a government of "lawyers, not of men." There is the elementary fact that lawyers are officers of the courts and that both prosecution and defense counsels have their first responsibility to the supreme law of the land, hence the Constitution. The highest ethics and the highest courage must be part of the legal profession operating on this principle, particularly when the view may be unpopular. Yet fortunately the history of the profession presents an inspiring record of those who have acted constantly in accordance with these concepts of freedom and constitutionality.

So long as the courts can and do continue to function in the manner indicated, so long as they do this with the approbation of public opinion and the support of the legal profession, we can stop the menace of statism and in these difficult times of international tension, prevent the growth of the garrison state. The courts have a body of magnificent principles for guarding freedom, and these taken with recent precedents can and must be the bulwark of our freedom.

[27] 249 U. S. 47 (1919).
[28] 250 U. S. 616 (1919).
[29] 337 U. S. 1, 4 (1949).
[30] Chafee, FREE SPEECH IN THE UNITED STATES, p. 80 (1941).

GIVE YOUR SUPPORT

Constitutional Amendment No. 1 will be on the ballot at the November general election. The provisions of this amendment are non-controversial and its passage will cure three ills now afflicting our judicial department. The measure has the support of both political parties, is endorsed by the District Judges Association and County Judges Association and is a small but vitally important part of the judicial reform program of the Colorado Bar Association. We know of no opposition to this measure but energetic support must be given by every lawyer and lover of good government to secure an affirmative vote on the amendment and to overcome the strong tendency of electors to vote against all constitutional changes. Take time to explain the purposes of this amendment to every voter whenever and wherever an opportunity presents itself. The text of Constitutional Amendment No. 1 and an explanation of its provisions may be found at page 338 of this issue of *Dicta.*

PAMPHLETS ARE NOW AVAILABLE

The Colorado Bar Association has reprinted a large quantity of two pamphlets which have enjoyed tremendous popularity in the past. These pamphlets entitled *"Wills, their importance and why you should have one"* and *"Joint Tenancy—is it wise for me?"* were prepared by the Public Relations Committee of the State Association. Lawyers and banks have mailed these with their monthly statements and have offered them to clients by displays on counters and waiting room tables with very satisfactory results. Any desired quantity of these pamphlets will be mailed without charge to lawyers or to banks able to make a proper distribution of them. The name of any bank distributing these pamphlets will be imprinted upon them for a slight charge. Requests for quantities or samples should be sent to the Secretary of the Colorado Bar Association, 702 Midland Savings Building, Denver 2, Colorado.

CHOATE'S PROVING A NEGATIVE

"A vessel insured was prohibited from going north of the Okhotsh Sea. Within a year, the duration of the policy, she was burned north of the sea proper, but south of some of the sea's gulfs. Defendant set up no loss within the policy. On the way to the court house Choate said to his associates, as they were for plaintiff: 'Why should we prove we were not north of that sea; why not let them prove we were?' The mate was put on to prove the burning within the year and state the loss. No cross-examination followed and the plaintiff rested. The defendant was dumfounded; had no witnesses ready; expected plaintiff would consume two days in proving he was within the terms of the policy. The case lasted an hour and Choate won."—*Reed's Conduct of Litigation,* 150.